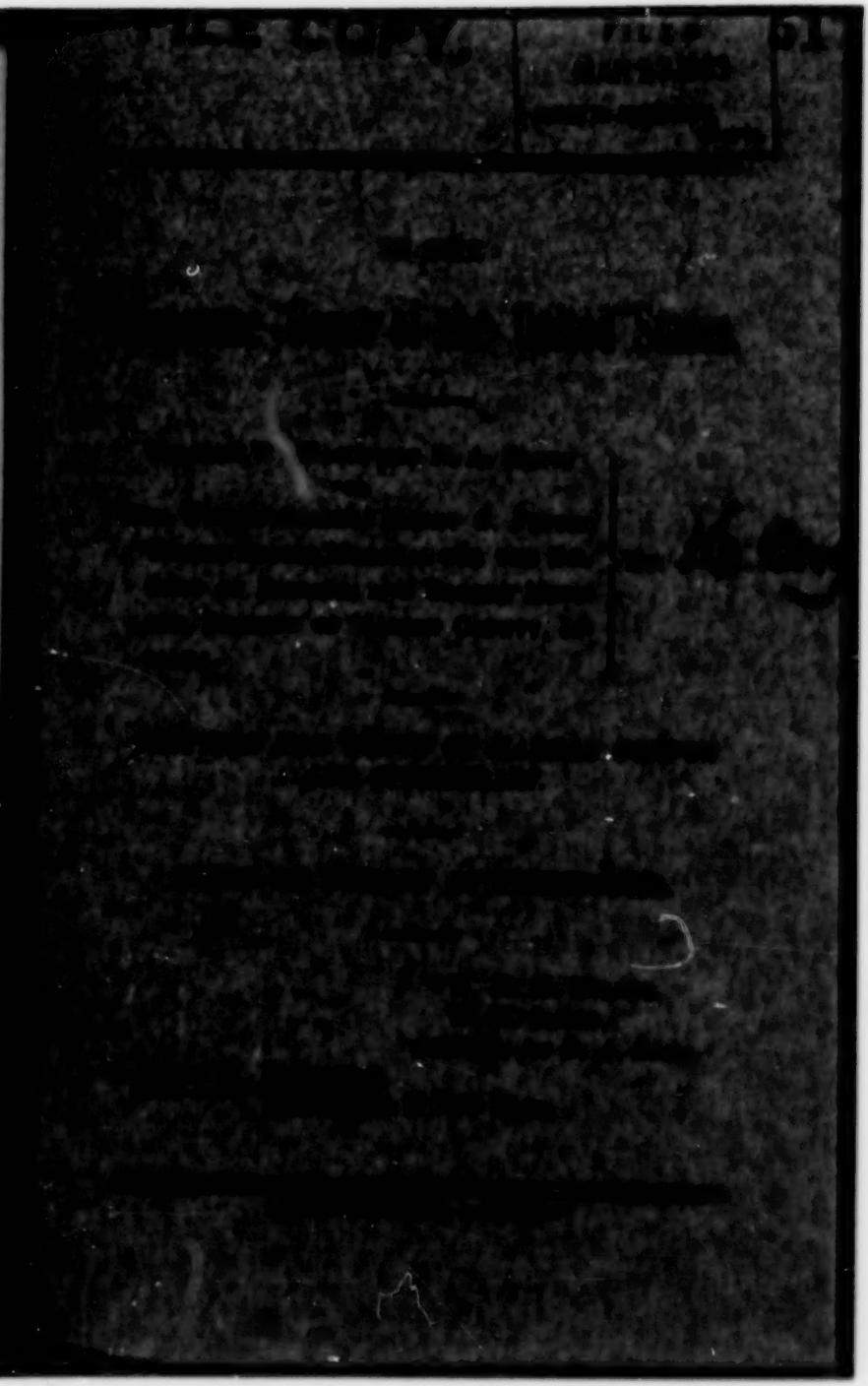

IN THE

Supreme Court of the United States.

WILLIAM W. WATTS AND D. A. HACKS vs. THE UNITED STATES, HENRY C. PUTNEY, UNITED STATES MARSHAL FOR THE DISTRICT OF INDIANA, AND ROBERT METZGER, SHERIFF OF MARION COUNTY, INDIANA.	No. ——.

PETITION FOR WRITS OF HABEAS CORPUS AND CERTIORARI.

BRIEF ON BEHALF OF PETITIONER.

The facts in this case are very fully set forth in the petitions of each of the petitioners, therefore only a very general statement will be made here.

On the 30th day of December, 1902, a complaint was filed in the Floyd Circuit Court of the state of Indiana by *Ryerson & Sons* v. *M. Zorn & Company*, a corporation doing business in New Albany, Indiana. Sum-

mons was duly issued and served, and on the same day an application was made to the judge of the Floyd Circuit Court (the court not being then in session), for the appointment of a receiver to take charge of the assets and business of the defendant corporation. The complaint alleged an indebtedness of $15,000 and more from M. Zier & Co. to the plaintiff, evidenced by promissory notes; also a large indebtedness to other parties; that the defendant was carrying on a large business, manufacturing boilers at said city of New Albany; that it was unable to meet its obligations as they matured; that its creditors were threatening to enter suit against it; that its manufacturing plant was employed in completing unfinished orders under uncompleted contracts; that if suit should be instituted against the defendant and its property seized upon execution or attachments, its property would be dissipated and its plant rendered much less valuable to its creditors than if said property were preserved and continued as a going concern; and that the property, funds and profits of the business were in danger of being lost or destroyed, unless a receiver were immediately appointed to take charge of said property, hold the custody and possession thereof and preserve the same under the order of court.

Thereupon the defendant, M. Zier & Co., appeared to said proceeding, and, on the same day, a receiver was appointed by the judge of the Floyd Circuit Court, he having the statutory power in vacation to make such appointment, such receiver being the New Albany Trust Co., a corporation authorized under the laws of the state to be appointed and to act as such receiver. Immediately upon such appointment it qualified, took possession of the property, made an

necessary of the same, caused the same to be appraised and the appraisement returned into court.

On the 16th of January, 1903, the receiver filed a report and petition, asking the advice of the court as to the conduct of the business; that the creditors be notified by mail, and publication of the time and place for hearing of said report and petition, and that the creditors be requested to appear and be present at the hearing of said petition.

The great majority of all creditors were present at such hearing on the 20th day of January, the hearing being in open court. Upon said hearing it was ordered by the court that the receiver should go on and complete all unfinished contracts; that he might purchase the necessary material for this purpose, but should make no new contracts; and the court further made an order enjoining the creditors from prosecuting any claims or suits against the estate except in that court or with its leave. The court was in session at the time these orders were made on the 16th and 20th days of January, 1903.

The Inland Steel Co., one of the parties who had appeared in the Floyd Circuit Court as above, and two other parties, on February 6, 1903, filed their petition in involuntary bankruptcy in the United States District Court for Indiana, against defendant, alleging the insolvency of the defendant and also alleging the appointment of a receiver in said Floyd Circuit Court. On the 11th day of February the Inland Steel Co. filed a further petition in the bankruptcy court alleging the said receivership and various other facts, as set out in the petition, and asking the court to appoint a receiver in bankruptcy, to take possession of the estate and property. On the same day the court in bankruptcy appointed Frederick D. Gunnoe, such

receiver, and directed him to take into his possession the sheet iron and boiler manufacturing plant and all the property connected therewith in New Albany, and which was then in the possession of the receiver of the said court, and ordered that the New Albany Trust Co. forthwith deliver the same to the receiver of the bankruptcy court and refrain thereafter from in any way interfering with the same. Clauss accepted the appointment and duly qualified thereunder. On the 13th of February he went to New Albany and demanded the possession of the property. Thereupon W. W. Watts, one of the petitioners, an attorney of Louisville, Ky., who had appeared for the plaintiff in said action of Ryerson & Son, and one H. A. Jewett, the vice-president of the New Albany Trust Co., being under the impression that the judge of the United States District Court could not have been advised of all the facts when he made the order for the summary taking possession of the property out of the hands of the receiver of the Floyd Circuit Court, procured from the Floyd Circuit Court an order authorizing them to go to Indianapolis and enter a special and qualified appearance only on behalf of the receiver of said Floyd Circuit Court, and to present the facts to said court in bankruptcy, with a view of avoiding any misunderstanding and preventing any conflict of authority in the premises.

On the 16th day of February, said Watts and said Jewett appeared before the said judge in bankruptcy, exhibited their orders from the Floyd Circuit Court and proceeded to present the facts as they understood them; a discussion arose between the judge and said Jewett and Watts which lasted for several hours during said 16th and 17th, when the judge gave them to understand that his demand for the property was

peremptory, and notified them that "While he did not wish to go to New Albany with a club, he would do so if necessary to obtain possession of the property," and he demanded from them a categorical answer as to whether said Jewett, as vice-president of the trust company, would surrender the property, and whether said Watts, as attorney for the receiver, would advise such surrender; and under the circumstances both answered in the affirmative.

Thereupon returning to New Albany and Louisville, said Watts being apprehensive that the judge of the Floyd Circuit Court would be angry at his making such a promise, procured his friend, D. A. Sachs, a lawyer of more experience than himself in Louisville, and his personal friend, to go with him to New Albany to see said judge, and they went over on the 18th. The details of what transpired on that day are not material to the question here. Suffice it to say the judge was angry, would not consent to give up the property, and, on the 19th, ordered proceedings against said trust company and said Watts for contempt of his court. Said Jewett, on behalf of said trust company did, however, on February 19, 1863, in pursuance of his promise, but against the wishes and order of the judge of the Floyd Circuit Court, turn over the property and plant of said M. Zier & Co., to Frederick P. Connor, receiver of the United States court, who had come again to New Albany armed with an order issued by the court in bankruptcy on the 17th day of February for the seizure of said property.

In the meantime, however, on the 14th day of February, 1863, said Connor, as receiver of the U. S. court, by the authority of that court, had been to New Albany and presented to the Floyd Circuit Court, then in ses-

sion, his petition, reciting his appointment and qualification as receiver and the order to take possession of the property, and, without any qualification as to his appearance, appeared in said suit in said Floyd Circuit Court, and filed said petition asking that the Floyd Circuit Court issue an order turning the property over to him as the receiver appointed by the United States District Court. This order is set out as a part of the petition. The Floyd Circuit Court, on said 11th day of February, the same being the last day of the term of the court, entered an order continuing the hearing of said petition until the next term of court, which would sit about three weeks thereafter. Thereupon the said receiver of the bankruptcy court reported to his court the facts and that he had not obtained possession, such possession being in the receiver of the Floyd Circuit Court, and thereupon the order of the district court of the 17th of February was made as hereinbefore recited. On the 20th day of February the judge of the Floyd Circuit Court made an order removing the New Albany Trust Co. as its receiver and appointed one Kelso in its place. Said Kelso qualified, and thereupon the judge of the Floyd Circuit Court ordered him to demand the property from Conner, and, Conner failing to deliver the same, the judge ordered the sheriff to take possession of the same and turn the same over to said Kelso, receiver, which was done. On behalf of the prosecution it was claimed that these proceedings by the Floyd Circuit Court were encouraged by the petitioners, Sachs and Watts. This they both emphatically denied. The property having been so reclaimed by the receiver of the Floyd Circuit Court, was held for a time by said receiver, though just how long the writer of this brief has not the data to enable him to state.

Upon the resetzure of said property by said Kelso, receiver, the proceedings in attachment for contempt were commenced in the court in bankruptcy against said Kelso, M. Zier, the sheriff of Floyd county, his deputy, two or three persons who acted simply as custodians of the property and said Sachs and Watts. A trial was had, and said Kelso and five or six others, excluding such custodians, were found guilty of contempt and were sent to jail for terms varying from sixty days to a week or ten days. Sachs and Watts not having been served with citation, were not present at that trial, but afterwards came to Indianapolis and entered their appearance and gave bond and their cases were set for hearing on the 9th of March, such hearing taking the entire week, and on Saturday, March 14th inst., they were each found guilty and sentenced to a term of sixty days in the Marion county jail for contempt. They were tried upon an information filed by the United States attorney, based on an affidavit filed by Frederick D. Cramer, receiver, setting forth the facts in relation to the seizure of said property as he understood them, and also on a rule to show cause.

The defendants each presents herewith his petition for a writ of habeas corpus, with a view to being released on bail pending the hearing, for a writ of certiorari, and for a final discharge.

The questions we wish to present are questions of jurisdiction and power on the part of the district court to make the summary orders for the seizure of this property out of the hands of the receiver of the state court, and to punish the petitioners for contempt for disobedience of such order.

It was contended upon the trial on behalf of the government, that, without regard to the question of

the jurisdiction of the bankruptcy court to issue the order in the first instance, his receiver having obtained possession of the property by the delivery of the assets by the New Albany Trust Co., it was a contempt of the bankruptcy court for any persons acting on behalf of the Floyd Circuit Court, or under its authority, in any way to interfere with or retake possession of said property. On behalf of the prisoners, on the contrary, it was insisted, that as the Floyd Circuit Court never consented to such surrender, and its receiver's act was wholly unauthorized and induced only by fears as to the action of the court of bankruptcy, therefore the possession of the bankruptcy court so obtained was no possession in law and might well be disregarded.

Assignment of Errors

The errors relied on are:

First. The United States District Court erred in attempting to take the property out of the hands of the state court by summary proceedings, having no jurisdiction so to do.

Second. The United States District Court erred in accompanying its order the exercise of the state court from dealing with said property, said order being beyond its jurisdiction.

Third. The United States District Court erred in assuming jurisdiction over the custody of said property.

Fourth. The United States District Court erred, its receiver having appeared and filed his petition in the Floyd Circuit Court, asking an order for the custody of said property, in failing to abide the decision of that court.

Fifth. The United States District Court had no jurisdiction to try these petitioners or either of them.

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I.

Had the court in bankruptcy any authority to summarily seize or order the seizure of this property in the hands of the receiver of the Floyd Circuit Court? As shown by the statement of facts, the action in the said court was *inter partes*. A receiver had been appointed in due form, had taken possession of the property under an order of a court having jurisdiction both of the subject-matter and parties. It is submitted, therefore, that the case was one clearly within the rule so forcibly announced in *Covell v. Heyman*, 111 U. S. 176, on page 182, where speaking of the matter of comity it is said:

"It is a principle of right and of law and therefore of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system so far as their jurisdiction is concurrent; and although they co-exist in the same space they are independent and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void."

That this principle applies in all its vigor as between the state courts and the United States district court sitting in bankruptcy, has been adjudged many times.

In *Peck v. Jenness*, 7 Howard 612, at page 625, it is said:

"It is a doctrine of too long established to require a citation of authorities, that when a court has jurisdiction it has a right to decide every question which occurs in the

cases, and whether its decision is correct or otherwise, its judgment, until reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court and the right of a plaintiff to prosecute his suit in it have once attached, that right can not be arrested or taken away by proceedings in another court. These rules have their foundation not merely in comity but on necessity, for if one may enjoin, the other may retort by injunction, and thus the parties be without right; being liable to a process for contempt in one, if they dare proceed in the other. Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice. * * * It follows, therefore, that the district court had no supervisory power over the state court either by injunction or the more summary method pursued in this case, unless it has been conferred by the bankrupt act. But we can not discover any provision in that act which limits the jurisdiction of the state courts, or confers any power on the bankrupt court to supersede their jurisdiction, to annul or vacate the their judgments, or to arrest property from the custody of their officers. On the contrary, it provides that all suits in law or equity then pending in which such a bankrupt is a party, may be prosecuted and defended by such assignee to the final conclusion in the same way and with the same effect as they might have been by such bankrupt. Instead of drawing the decision of the case into the district court, the act sends the assignee in bankruptcy to the state court where the suit is pending and admits its power to decide the cause."

This is equally true of the present bankrupt law.

Subsection b, of Section 11 of the Bankrupt Act, reads as follows:

"The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt."

c reads as follows:

"A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the

bankrupt prior to the adjudication with like force and effect as though it had been commenced by him."

In the case at bar, as we have seen, under the order of the court in bankruptcy, the receiver of the bankrupt court actually went into the state court, made himself a party to the proceedings and filed his petition, and then, because the state court did not act upon the same immediately, the bankruptcy court, disregarding the order of the state court, peremptorily ordered the immediate seizure of the property.

The same principles which are announced in the Peck-Jennress case, *supra*, under the bankrupt law of 1841, were again announced by this court in *Eyster v. Gaff*, 91 U. S. 521, under the act of 1867.

Perhaps nowhere are the relative rights and duties of judges of state and federal courts and the absolute necessity of observance of this principle of comity better stated than by Mr. Justice Miller in the case of *Johnson v. Bishop*, 1 Woodworth 324.

The same principles were announced and acted upon in *Marshall v. Vose*, 16 Wall. 551; in *Townsend v. Jemison*, 3 Dillon 370; in *Bradley v. Frost*, 3 Dillon 475, and by this court very recently in *Metcalf Bros. & Co. v. Barker*, 23 Sup. Ct. Rep. page 67.

It was, however, stated by his Honor, Judge Anderson, in the opinion deciding this case, that no case could be found where as between the bankruptcy court and a state court the principle of comity had prevented the bankruptcy court from seizing property, except in cases where the proceeding in the state court was based upon a valid lien. It is respectfully submitted that this contention, if founded in fact, would be without force. The rule does not rest on any question of that kind but on the necessity of each

court respecting the actual possession of the other in order to avoid conflicts. Even when there is a lien the bankruptcy court has the right to the custody of the property, unless in possession of another court.

But we beg to say that in this contention the judge of the district court was in error as matter of fact.

In the case of *Johnson, Assignee*, v. *Bishop*, *supra*, there was an attachment upon mesne process, which however was dissolved by the commencement of the proceedings in bankruptcy. This being so, of course there was no lien. And yet Mr. Justice Miller applies the rule in its widest scope. He says the title to the property was in the assignee, as was also the right of immediate possession. But he says also, "this possession he could recover in a court of justice; but to what court should he apply. Had this property been in the possession of a party who could not shelter himself behind the jurisdiction of a court of law, undoubtedly the federal court would have had jurisdiction of the case." But the property being in the possession of a court of law, it was held that the bankrupt court had no right to attempt to seize it, and the doctrine stated in *Peck* v. *Jenness* was applied, that case being cited.

So in *Bradley* v. *Frost*, 3 Dillon, 457, *supra*, it was held that, as against the sheriff, property which had been levied upon by attachment and sold, and the proceeds paid over to the creditor, the assignee in bankruptcy could not recover for the same, but that he might as against the creditor himself. It is distinctly held in that case that the attachment was dissolved by the bankruptcy proceedings, and that the subsequent sale, therefore, upon execution on the judgment rendered in the attachment proceeding could pass no title.

In re Price, 92 Fed. Rep. 987, is another case where

there was no lien. That was a case of a receivership in a suit between insolvent partners for dissolution. And it was held that the court could not order the receiver to surrender the property to the trustee, but that the latter must apply to the state court to be substituted as plaintiff in the action and to move that court for an entry of a decree in the case, and for an order directing the receiver to transfer the assets to him.

In re Longert, 110 Fed. 927, certain judgments had been rendered, but the proceedings in the state court were not based upon them and no relief was sought touching them. After the judgments were obtained and property was levied upon, the directors of the corporation applied for a voluntary dissolution thereof on the ground of insolvency, and a temporary receiver of the property was appointed by the state court. Two days subsequently involuntary proceedings in bankruptcy were commenced, and a receiver was appointed under the bankrupt act, and he sought to obtain possession of the property from the receiver of the state court. It was held by the bankrupt court that the proceeding in the state court was only incident to the insolvency of the corporation, and that the bankrupt act gives exclusive jurisdiction to the United States courts in such matters and ousts the state courts of all jurisdiction with respect to the possession or distribution of insolvent's assests. But it was said:

"The receiver of this court is therefore entitled to the custody of the property, but, in view of the comity which exists between federal and state courts, and the fact that the receiver is an officer of the state court and acting under its immediate direction, application should be made to it for a proper order in the case.

In re Lesser, 100 Fed. 433, 439."

In re Wells, 114 Fed. 222. The syllabus of that case, second paragraph, reads as follows:

"On the day following the filing of a petition in involuntary bankruptcy against a debtor, and before any action had been taken by the court, a corporation commenced an action in replevin in a state court to recover property of which it claimed to be the owner, but which was in the possession of the bankrupt, and such property was taken under the writ of replevin. Subsequently the court of bankruptcy appointed a receiver, made an adjudication, and appointed a trustee. *Held*, that it did not acquire jurisdiction over the property which had been taken on the writ of replevin, and which was never in its possession, and was not authorized to enjoin the further prosecution of the action in the state court and compel the plaintiff therein to submit its claims to its own jurisdiction."

In that case it seems, that, although the petition in bankruptcy was filed the day before the suit in replevin was commenced, yet no writ was issued or order made thereon. In other words, the court apparently did not deem the actioin in replevin to have precedence, because no order was issued till after action was taken in the state court. In that case also there was no lien.

We call attention also, along the same line, to

In re Ward, 104 Fed. 985;

Smith v. *Belford*, 106 Fed. 658, a decision of the Circuit Court of Appeals of the Sixth Circuit;

Sinsheimer v. *Simonson*, 107 Fed. 898 (Comingore case), same court;

Louisville Trust Co. v. *Comingore*, 184 U. S. 18.

This last case, although involving a question of adverse claim, is in principle in point. Would it be asserted that, if the money paid to the attorney and

to the assignee had been still in the custody of the Jefferson Circuit Court, the decision of this court would have been different? This Comingore case also is instructive, in that it is held that a stranger to bankruptcy proceedings is not to be held bound by those proceedings, unless he has consented to the jurisdiction.

National Bank of Republic v. *Hobbs*, 118 Fed. 626.

This last decision was a controversy between the bankruptcy court and the United States Circuit Court, and it was held that the bankruptcy of the debtor would not supersede a proceeding in the circuit court upon a creditor's bill.

Perhaps no case is more instructive upon this question than the case of *White* v. *Schloerb*, 178 U. S. 542, cited and commented upon by this court in the case of *Metcalf* v. *Barker*, *supra*. There an attempt was made to take property out of the custody of the United States Court sitting in bankruptcy, and it was held that it could not be done, and that where the bankruptcy court had first obtained possession of the property, but the property had been taken out of its hands by writ of replevin, the bankruptcy court had a right to repossess the property by summary proceedings. And why? Because the property had never been rightfully in the possession of the state court, or rightfully out of the possession of the United States Court.

The Chief Justice in the Barker case, speaking of this decision, says:

"This cautious utterance,—and courts must be cautious when dealing with a conflict of jurisdiction—sustains as far as it goes the converse of the proposition when presented by a different state of facts."

Now what is the converse of the proposition. It is that, if the state court has obtained rightful possession, and its possession is wrongfully displaced by the federal court, then the state court has the right by summary proceedings to retake the property, and that was exactly what was done in the case at bar, and exactly what is alleged as the basis for these contempt proceedings. We submit that, if the property being rightfully in the custody of the bankruptcy court and being seized by writ of replevin from the state court, it may be summarily reseized, in the same way and by the same logic and by the express declaration of this court in the Metcalf case, the state court being in lawful possession and being wrongfully dispossessed, as it was in this case, may reseize the property.

II

It seems to us, therefore, that the only question here is whether the state court rightfully appointed a receiver and took possession of this property. As we have seen, it was done upon a complaint filed, process issued and served, appearance entered, the receiver appointed. The receiver qualified, took possession, entered upon his duties, made contracts and purchases of property, incurred expenses and was in the administration of the trust more than a month before any bankruptcy proceedings were filed. It was argued by the learned judge of the district court in his opinion that because the defendant in this suit, M. Zier & Co., failed to make a defense and apparently consented that a receiver might be appointed, that the suit was collusive and that no jurisdiction was obtained. It is

submitted that the jurisdiction of a court can not be upset upon such grounds and in this collateral way.

Phelps v. *Mutual Reserve Fund Life Association*, 112 Fed. 453.

The cases are exceedingly rare in which a judgment or proceedings of the court can be treated as void collaterally, where the subject-matter was within the competence of the court and the parties were properly before the court. In order to get rid of the effect of such a judgment, or order, the general rule is that the proceedings must be had in the case and in the court in which the unauthorized or fraudulent judgment or proceedings were obtained.

Weiss v. *Guerineau*, 109 Ind. 438;
Hollinger v. *Reeme*, 138 Ind. 363.

III.

It was also insisted on the part of the judge of the district court that this proceeding in the Floyd Circuit Court was in the nature of a bankruptcy proceeding because the complaint there alleged the insolvency of the defendant.

We think the court was in error in this also.

In the case of *Mayer* v. *Helman*, 91 U. S. 496, it was held that proceedings by voluntary assignments under a law of Ohio providing for such assignments was not a proceeding under an insolvent law, and therefore such act of the legislature of Ohio was not superseded by the bankrupt act. On page 502 this court says:

"The answer is, that that statute of Ohio is not an insolvent law in any proper sense of the term. It does not compel, or in terms even authorize, assignments: it assumes that such instruments were conveyances previously known, and

only prescribes a mode by which the trust created shall be enforced. It provides for the security of the creditors by exacting a bond from the trustees for the discharge of their duties; it requires them to file statements, showing what they have done with the property; and affords in various ways the means of compelling them to carry out the purposes of the conveyance. There is nothing in the act resembling an insolvent law. It does not discharge the insolvent from arrest or imprisonment; it leaves his after-acquired property liable to his creditors precisely as though no assignment had been made. The provisions for enforcing the trust are substantially such as a court of chancery would apply in the absence of any statutory provision. The assignment in this case must, therefore, be regarded as though the statute of Ohio, to which reference is made, had no existence. There is an insolvent law in that state; but the assignment in question was not made in pursuance of any of its provisions. The position, therefore, of counsel, that the bankrupt law of congress suspends all proceedings under the insolvent law of the state, has no application."

Much less is an ordinary equity suit for the appointment of a receiver—not to wind up the corporation—but simply to collect assets and pay debts, a proceeding under an insolvent law.

The learned judge of the district court relied upon the decisions like *In re Smith*, 92 Fed. 135, to the effect that the making of a voluntary assignment being an act of bankruptcy, therefore the law with reference to such assignments is suspended during the existence of the bankrupt act, and that, by such an assignment, the party making the same does not carry his property into the state court, and therefore, as said by Judge Baker, for the district of Indiana, in deciding *In re Smith*, "no question of concurrent jurisdiction or conflict of jurisdiction can possibly arise." It is submitted that the question of comity between state and federal courts does not rest upon the ques-

tion whether the court which has the property has obtained it rightfully or not in the first instance. The reason of the rule, as has been so often stated by this court, is in its necessity. And the purpose is to prevent unseemly conflicts, just such troubles as have arisen from a disregard of the rule in this case.

But we are not driven to discuss this question. In the case at bar there was no voluntary assignment. It was a receivership created in a suit *inter partes*. At the time the suit was commenced and the receiver appointed there was nothing in the bankrupt act in any way applying to such receiverships, no proceedings in bankruptcy had been commenced; it was uncertain that any ever would be commenced. The state court therefore lawfully obtained possession of the property, and unless the decisions heretofore cited are entirely misapprehended, the bankruptcy court did right in filing its petition in the state court asking that court to turn over the property; and it did wrong in failing to await the decision of that court but on the contrary undertook summarily to seize possession of the property. *Johnson* v. *Bishop*, *supra*. If it be conceded that the bankruptcy court had a right to the property, that the state court was in duty bound to surrender it, the law presumes that the state court would do its duty.

The bankruptcy court, it is submitted, had no right to assume the contrary, and especially, having made itself a party to that proceeding and filed its petition, it should have awaited action upon the same. In his opinion the learned judge of the bankruptcy court says that the petition of his receiver was treated "contemptuously." All that was done was that the state court on the last day of the term continued the hearing until the next term about three weeks hence.

Evidently, in view of what was done within the next two or three days, namely, sending the vice-president of his receiver and an attorney up here to represent the facts to the bankruptcy court, the purpose of the judge of the state court was to arrive at a rightful determination in the matter, and to assist the bankruptcy court in arriving at such determination by a presentation of the entire facts to the judge thereof.

IV.

But it was said by the learned judge of the bankruptcy court that, if he were compelled to do so, he would hold that the amendment to the bankrupt law of February 5, 1903, is retroactive, the provision of section 3 of that law added by such amendment being as follows: (Defining acts of bankruptcy.)

> "Or being insolvent apply for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory or of the United States";

and he would hold the same was applicable to this case, and that the creation of this receivership more than a month prior to the enactment which makes such receivership an act of bankruptcy, would authorize an adjudication of bankruptcy against this party.

We shall not stop to argue this question at length. If any proposition of law is settled beyond all controversy it is that no act is retroactive unless *expressly* or by *necessary implication* made so. And this is emphatically so as to any law imposing a penalty, or a new liability, or making an act a wrongful act which

was before a rightful act, or in any way imposing a new liability.

Chew Heong v. *United States*, 112 U. S. 536, 559;

Endlich on Statutes, 276;

Williams v. *Harding*, Law Reports 1 H. of L. 9;

McEwen v. *Den*, 24 How. 245.

Moreover it is submitted that upon the face of this statute it clearly ought not to be so construed. When the original bankrupt law was enacted, congress having evidently in mind this principle that no man ought to be held to have committed an act wrongful or in violation of a statute, when no statute was in force at the time such act was committed, provided:

"Section 71. This act shall go into full force and effect upon its passage: *Provided, however*, that no petition for voluntary bankruptcy shall be filed within one month of the passage thereof and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof."

"B. Proceedings under state insolvency laws before the passage of this act shall not be affected by it."

There was manifested the clear purpose, first, by providing that no petition shall be filed within four months, that no one should be charged with the commission of an act of bankruptcy done before the act was passed, and, second, that no pending proceedings under state insolvency laws should be affected by it.

Now what reason is there to suppose that congress intended a different rule to be applied to this amendment creating this new act of bankruptcy? No construction such as was contended for in the bankrupt court is required by the terms of the act at all. The amendments of February 5, 1903, were many. The

provision of the last section of the act, 74, being the 19th of the amendments, that the act shall not apply to bankruptcy cases pending when this act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of the said act of July 1, 1898, may be given full effect without any such construction. There are very many provisions to which that last section may be applied other than the one in question. For instance, on page 5, subsection 5, as to additional compensation of officers, so on page 7, section 4; so as to discharges, page 10, sub-section b, is amended by leaving out the word "fraudulent" before intent, etc.; so on page 11, section 17, the word "liabilities" in place of "judgment" in clause 2; and so on through the nineteen sections. Therefore it is submitted that the law can not be construed as retroactive.

In conclusion, therefore, we submit that the bankruptcy court transcended its authority in disregard of the rules of comity that necessarily obtain, and which this court has so many times adjudged must obtain, between the state and federal courts, that its proceedings in the premises were unwarranted and that the prisoners ought to be discharged, and pending the hearing be admitted to bail.

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